

FILED
APR 30 2009
RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ANTHONY PORTER,

No C-08-1496 TEH (PR)

Petitioner,

v.

ORDER TO SHOW CAUSE

ROBERT HOREL, Warden,

Respondent.

Petitioner, a state prisoner incarcerated at Pelican Bay State Prison in Crescent City, California, has filed a pro se First Amended Petition for Writ of Habeas Corpus under 28 U.S.C. Section 2254 challenging a judgment of conviction from Monterey County Superior Court. The First Amended Petition was filed after the Court dismissed the initial petition with leave to amend because it contained both exhausted and unexhausted claims. See Doc. #4. In the First Amended Petition, Petitioner removed the unexhausted claim "that is still pending before the state courts for argument." Doc. #5 at 1. According to the California Appellate Courts Case Information website, the California Supreme Court is hearing

1 argument on petitioner's unexhausted claim on May 6, 2009.
2 [http://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=](http://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=0&doc_id=1883951&doc_no=S152273)
3 [0&doc_id=1883951&doc_no=S152273](http://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=0&doc_id=1883951&doc_no=S152273).
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5 I

6 On May 6, 2005, Petitioner was sentenced in Monterey
7 County Superior Court to 25 years in state prison following his
8 convictions for various crimes including attempted murder, shooting
9 at an inhabited dwelling, assault with a semiautomatic firearm and
10 shooting from a motor vehicle, and for true findings on various
11 sentencing enhancements.

12 The California Court of Appeal affirmed the judgment in an
13 unpublished opinion. People v. Porter, No. H029031, 2006 WL 3649273
14 (Cal. Ct. App. Dec. 14, 2006). The court also denied habeas relief
15 on the same day in a separate order. In March 2007, the California
16 Supreme Court denied review. Petitioner filed the instant First
17 Amended Petition on November 3, 2008.
18

19 II

20 This Court may entertain a Petition for a Writ of Habeas
21 Corpus "in behalf of a person in custody pursuant to the judgment of
22 a State court only on the ground that he is in custody in violation
23 of the Constitution or laws or treaties of the United States." 28
24 U.S.C. § 2254(a). It shall "award the writ or issue an order
25 directing the respondent to show cause why the writ should not be
26 granted, unless it appears from the application that the applicant
27 or person detained is not entitled thereto." Id. § 2243.
28

Petitioner's claim that he is actually innocent, however, is DISMISSED. The United States Supreme Court has not yet recognized that a free-standing claim of actual innocence is cognizable in federal habeas proceedings. See House v. Bell, 547 U.S. 518, 554-55 (2006), citing Herrera v. Collins, 506 U.S. 390, 417, 418-19 (1993). Because there is no clearly-established Supreme Court authority recognizing that a free-standing claim of actual innocence is cognizable on federal habeas review, relief cannot be granted on this claim. See 28 U.S.C. § 2254(d).

For the foregoing reasons and for good cause shown,

1. The Clerk shall serve by certified mail a copy of this Order and the First Amended Petition, and all attachments thereto, on Respondent and Respondent's attorney, the Attorney General of the State of California. The Clerk also shall serve a

1 copy of this Order on Petitioner.

2 2. Respondent shall file with the Court and serve on
3 Petitioner, within 60 days of the issuance of this Order, an Answer
4 conforming in all respects to Rule 5 of the Rules Governing Section
5 2254 Cases, showing cause why a Writ of Habeas Corpus should not be
6 granted. Respondent shall file with the Answer and serve on
7 Petitioner a copy of all portions of the state trial record that
8 have been transcribed previously and that are relevant to a
9 determination of the issues presented by the Petition.

10 If Petitioner wishes to respond to the Answer, he shall do
11 so by filing a Traverse with the Court and serving it on Respondent
12 within 30 days of his receipt of the Answer.

13 3. In lieu of an Answer, Respondent may file a Motion to
14 Dismiss on procedural grounds, as set forth in the Advisory
15 Committee Notes to Rule 4 of the Rules Governing Section 2254 Cases.
16 If Respondent files such a motion, Petitioner shall file with the
17 Court and serve on Respondent an Opposition or Statement of
18 Non-Opposition within 30 days of receipt of the motion, and
19 Respondent shall file with the Court and serve on Petitioner a Reply
20 within 15 days of receipt of any Opposition.

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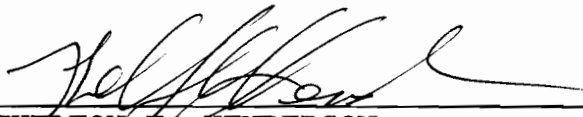
28

1 4. Petitioner is reminded that all communications with
2 the Court must be served on Respondent by mailing a true copy of the
3 document to Respondent's counsel. Petitioner also must keep the
4 Court and all parties informed of any change of address.

5
6
7 IT IS SO ORDERED.

8
9 DATED

4/29/09


THELTON E. HENDERSON
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA

ANTHONY PORTER,
Plaintiff,

v.

ROBERT HOREL et al,
Defendant.

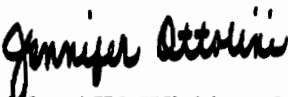
Case Number: CV08-01496 TEH
CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on April 30, 2009, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Anthony Will Porter #:F-72952
Pelican Bay State Prison
Housing: B-5 C-230
P.O. Box 7500
Crescent City, CA 95532

Dated: April 30, 2009


Richard W. Wieking, Clerk
By: Jennifer Ottolini, Deputy Clerk